United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,106

CALVIN FIELDS

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTION PRESENTED

Whether the Trial Court was required to instruct the jury that no inference unfavorable to the defendant should be drawn from the unexplained fact that an alleged accomplice to the crime charged was not present at trial and did not testify although repeated mention of his presence was made throughout the trial.

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JURISDICTIONAL STATEMENT

This is an appeal from conviction and sentence for assault with intent to commit robbery in violation of 22 D. C. Code 501 (1951 Ed.). This Court has jurisdiction by reason of 28 U.S.C. 1291.

STATEMENT OF THE FACTS

Appellant was indicted, tried before a jury, convicted, and sentenced to imprisonment for one to five years for assault upon Lorenzo Costa, Jr. with intent to commit robbery.

At his trial, in identifying the case (TR 7), in opening the case (TR 17), in closing (TR 63), and in rebuttal argument (TR 68), the government made repeated mention of one Arnold Edward Mack, alleged to have been an accomplice of Appellant. Numerous references were made to Mack during the trial by witnesses (TR 19, 20, 21, 23, 28, 39), Appellant (TR 50), counsel for the government (TR 54, 55, 57), and Appellant's attorney (TR 32, 66).

Upon being advised of his right not to testify, Mack declined to do so (TR 61).

No instruction was given the jury that no inference unfavorable to the Appellant was to be drawn from the absence of Mack and his failure to testify. (TR 71, et seq.).

STATEMENT OF POINTS RELIED ON

(Note: Because of the brevity of the transcript and the repeated mention of Mack throughout, Appellant did not feel required to follow Rule 41(j) of the Rules of this Court dealing with record references as to points.)

1. The Trial Court erred in not instructing the jury that no inference unfavorable to defendant (Appellant) was to be drawn from the fact that an alleged accomplice to the crime charged (Arnold Edward Mack) was not present at trial and did not testify.

2. The error of the Trial Court is plain, affects substantial rights of Appellant and should be noticed by this Court although not brought to the attention of the Trial Court.

SUMMARY OF ARGUMENT

Throughout the trial, there was numerous and repeated mention of the presence of one Mack, an alleged accomplice of Appellant, at the place and time of the assault of which Appellant was convicted. Mack declined to testify, relying upon his privilege against self-incrimination. His failure to testify was never explained in any way to the jury. Nor was the jury instructed that no inference unfavorable to Appellant was to be drawn from the failure of Mack to testify.

Thus the jury was free to speculate upon what Mack's testimony would have been and to infer that Mack's testimony would have been unfavorable to Appellant. This was error, the effect of which was to deprive Appellant of a fair jury trial, a substantial right.

ARGUMENT

The Trial Court plainly erred when it failed to instruct the jury not to draw inferences unfavorable to Appellant when an accomplice exercised his Fifth Amendment rights and refused to testify. His unexplained absence from trial and failure to testify resulted in prejudice to Appellant and deprived him of a fair trial.

From the identification of this case in the Trial Court (TR 7) to rebuttal (TR 68), there were repeated mentions by the attorney for the government, by the attorney for the defense, by Appellant, and by other witnesses of the presence of the juvenile accomplice Mack at the time of the alleged assault upon the complaining witness. The proceedings in the Trial Court were short. Repeated mention of the presence of Mack had to lead the jury to speculate on the reasons for his absence and, most likely, infer that his testimony would be unfavorable to Appellant. The Trial Court gave no curative instruction.

Appellant recognizes that there was not present an aggravated case of prosecution misconduct such as is present in De Gesualdo v. People, 364 P.2d 374, 86 A.L.R. 2d 1435 (Colo. 1961). Nonetheless, absent curative instructions, Appellant had to be prejudiced by the unexplained absence of Mack and his failure to testify.

Although not identical, this case is analogous to United States v. Maloney, 262 F.2d 535, (2nd Cir. 1959). There the Court reversed a conviction because no instruction was given (although not requested) that the refusal of a witness to answer questions on Fifth Amendment grounds may not be used as a basis for inferring what his answer would have been had he testified. In identical fashion in the case at bar, Mack's absence and failure to testify was unexplained. Absent curative instruction the jury most probably did, and at least, could have taken Mack's absence as evidence of the fact that his testimony would have been unfavorable to Appellant.

The Supreme Court has had occasion to consider the problem in Namet v. United States, 373 U. S. 179, 83 Sup. Ct. 1151, 10 L.ed. 2d 278 (1963). The Supreme Court sets forth two factors, each of which suggests error. First, that the error may be based upon a concept of prosecutorial misconduct. Such a claim is not made here. The second is based " . . . upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." (373 U. S. at 187) (Emphasis added). This is the substance of Appellant's claim to error on the part of the Trial Court. The circumstances compelling an unfavorable inference in this case are:

(1) Unlike the "minor lapses through a long trial" discussed in Namet and United States v. Hiss, 185 F.2d 822, 832 (2d Cir. 1950), Appellant's trial was a short one.

(2) Throughout the trial there were references to Mack whose absence and failure to testify was completely unexplained at trial.

(3) A curative instruction was not given by the Trial Judge. All of this plainly prejudiced Appellant.

Although not precisely in point, this Court approached the problem in Billeci v. United States, 87 App. D. C. 274, 184 F.2d 394, 24 A.L.R. 2d 881 (1950), as follows:

> "If the prosecution puts a witness on the stand and the witness refuses to testify because his answer might incriminate him, the jury cannot infer that his testimony, if given, would be adverse to the defendant. The witness has a constitutional right to refuse to testify if the testimony would incriminate him, but the possible guilt of the witness is not inferable to the defendant. Such an inference, without more support, would be no more than speculation.
>
> * * * * * * * *
>
> We think that the correct rule is that, when a witness declines to answer a question on the ground that his answer would tend to incriminate him, that refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant. The witness in such an incident is exercising a constitutional right personal to him. That exercise, without more, should not be to the harm of someone else. His answer, if given, might conceivably be that he but not the defendant was guilty of the offense, citing Beach v. United States, C.C., 46 Fed. 754 (1890). . . " (Emphasis added).

So here in discussing the possible testimony of Mack with the Court, counsel for Appellant stated (TR 42):

> "In discussing the matter with him (Mack) in the cellblock this morning, he told me that he was the one who got in the fight first of all with Mr. Costa."

Mack, after being advised of his right to remain silent, elected not to testify. Under these circumstances, his " . . . refusal alone cannot be made the basis of any inference by the jury . . . (his) exercise, without more should not be to the harm of someone else."

Billeci v. United States, supra.

The Supreme Court in Namet, supra, found that no inferences of material importance were present and therefore did not reverse. As above noted, in Maloney, supra, it was held that failure to give the admonition fell within rule 52(b) F. R. Cr. P. Under the circumstances of this case, particularly (a) the short duration of the trial and (b) the repeated references to Mack whose absence and failure to testify went unexplained, the absence of curative instruction requires reversal.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,106

CALVIN FIELDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
SEYMOUR GLANZER,
JAMES E. KELLEY, JR.,
Assistant United States Attorneys.

Cr. 1343-66

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Whether the trial judge committed plain error when he did not instruct the jury to draw no inference unfavorable to appellant from the fact that a juvenile accomplice to the offense, Mack, was not present at trial and did not testify when (a) there was no request for such an instruction; (b) it was perfectly natural that Mack would be mentioned during trial as frequently as he was; (c) there was evidence from appellant that Mack was in the Receiving Home at the time of trial; (d) neither counsel commented on Mack's absence, mentioned that he did not testify or attempted to draw any inference from those facts; and (e) the instructions did not refer in any way to Mack's absence or failure to testify.

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OTHER REFERENCES

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*Cases chiefly relied upon are marked by asterisks.

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed November 29, 1966, appellant was charged with assault with intent to commit robbery (22 D.C. Code § 501). After a trial before Judge Gasch on April 10, 1967, the jury found him guilty as charged. On May 24, 1967, he received a one to five year term of imprisonment to begin at the expiration of another sentence previously imposed.

In opening statement to the jury the prosecutor proffered that the Government would show that at 1:00 a.m. on Sunday, October 16, 1966, the complainant, Lorenzo Costa, Jr., was waiting for a bus at a stop in the 3300

block of 14th Street, Northwest, when appellant "accompanied by another individual, a juvenile, whose case is not before you, Arnold Mack," approached him, beat him and went through his pockets (Tr. 16-17). The prosecutor had stated previously during the *voir dire* of the jury that appellant had been accompanied by a juvenile, Arnold Edward Mack. Defense counsel had suggested on *voir dire* that Mack might be called as a defense witness. (Tr. 7, 10-11.)

Lorenzo Costa, Jr., 60 years old, of 4200 14th Street, Northwest, was the Government's first witness. At about 1:00 a.m. Sunday, October 16, 1966, he had just purchased a Sunday paper and was awaiting a bus at a stop in front of 3319 14th Street, Northwest, when two men, one of whom was appellant, approached him and without a word began to beat him. The blows caused him to fall down in the middle of the sidewalk. He was "sort of dazed." A person who identified himself as Officer Gray then came over and arrested the two men. (Tr. 18-19.) Costa sustained a fractured left shoulder and was taken to Washington Hospital Center for treatment (Tr. 20, 39-40). On cross-examination, in response to a question whether appellant or Mack had come up to him first, Costa stated that the two had approached him simultaneously (Tr. 21). In answer to other questions he testified that they began striking him simultaneously, that he had had no conversation with Mack prior to the beating and that Mack had not made the initial approach and asked for 30 cents (Tr. 21, 23-24). Costa's billfold was not taken and he did not recall anyone going through his pockets (Tr. 25, 26).

Police Officer Leonard A. Gray, Thirteenth Precinct Tactical Force, the second Government witness, was off duty in civilian clothes at about 1:00 a.m. October 16, 1966 (Tr. 27, 29). Walking northerly on the East side of 14th Street he had reached the bus stop in the 3300 block and was standing back from it against a window (Tr. 28, 31). He had observed Costa, newspaper in hand, for about five minutes and had also noticed two persons

walking southerly on the East side of 14th Street (Tr. 28-29, 31). These two then approached Costa, who was standing at the bus stop some 10 to 15 feet away from the officer (Tr. 28-29, 33),

> and at this time they began to hit him and knocked him to the ground. As they hit him and knocked him to the ground, they attempted to go through his pockets (Tr. 28).

Gray then ran up to the two assailants, appellant and Mack, told them he was a police officer and placed them under arrest. He told Costa, who was semi-conscious, that everything was okay. A scout car was summoned. (Tr. 28.) On cross-examination Gray testified that no conversation had preceded the assault, that both Mack and appellant had approached Costa at about the same time, that both had struck him at the same time and that both had attempted to go through his pants pockets (Tr. 32-34).

After the Government had concluded its case with the testimony of one of the transporting officers, defense counsel informed the court at the bench that he had subpoenaed Mack as a witness. There was a discussion at the bench about Mack's privilege not to incriminate himself. (Tr. 42-44.) The jury was then excused and Mack was called to the stand. He did not know whether charges arising out of the October 16, 1966, incident were pending against him. Advised of his right not to testify on self-incrimination grounds, Mack expressed a desire to speak with a lawyer. He was then returned to the cellblock. (Tr. 46-48.) At the end of appellant's direct testimony trial counsel and Miss Barbara Babcock of the Legal Aid Agency approached the bench where Judge Gasch asked Miss Babcock to confer with Mack about whether he should testify (Tr. 52-54). Later at the conclusion of appellant's testimony, counsel and Miss Babcock again approached the bench, and she informed the court that Mack did not wish to testify (Tr. 61).

On the stand appellant testified that he had worked until midnight at "Linens of the Week", a laundry at

713 Lamont Street, Northwest (Tr. 49-50). After work he had walked his girl friend, also an employee of the laundry, home to Irving Street (Tr. 49-50). On his own way home after dropping her off he met Mack at 11th and Kenyon Streets. They struck up a conversation and began walking together. Proceeding westerly on Monroe Street they came to "14th and Park—14th and Monroe" Streets. There, as it was raining hard, appellant stopped to zip up his jacket. When he straightened up after doing so, he saw Mack "pounding" on an old man standing in a doorway on 14th Street. Grabbing Mack he asked what had happened. Mack said something about 30 cents. When Mack was about to strike the old man again, appellant "shoved the man to the side like that, and the man fell to the ground." (Tr. 50.) At this time Officer Gray ran up, pulled his gun and placed appellant and Mack under arrest (Tr. 50-51). Appellant's purpose in pushing Costa was to protect him from further harm from Mack. Neither appellant nor his companion went through Costa's pockets. (Tr. 51.) During cross-examination appellant testified that Mack, 16 years old at the time of the offense, was 17 now and presently at the Receiving Home (Tr. 54-55).

In his summations the prosecutor emphasized the Government's evidence that appellant and Mack together had fallen upon the complainant, beaten him and attempted to rob him (Tr. 62-64, 67-70). Defense counsel in his closing pointed to evidence from appellant that the altercation had started between Mack and Costa only and that appellant had acted to protect Costa (Tr. 64-67). Neither counsel mentioned at any time that Mack was not present at trial or that he did not testify. Nor did either counsel attempt at any time to draw any significance from such facts.

After closing arguments counsel were asked at the bench whether there were requests for special instructions. Defense counsel's only request was for an instruction on simple assault as a lesser included offense of assault with intent to commit robbery. (Tr. 70.) In his charge the court did not mention that Mack was not present or that

he did not testify and did not give any instructions relating to such facts (Tr. 71-84). Prior to excusing the jury after the instructions the court asked counsel at the bench if there were any suggestions. Defense counsel only suggested a clarification of the simple assault instruction. (Tr. 84-85.)

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 501, provides:

> Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

SUMMARY OF ARGUMENT

The absence of an instruction, when none was requested below, that the jury was to draw no inference unfavorable to appellant from the fact that Mack was not present at trial and did not testify was, if error at all, harmless error. In the circumstances of the trial it is unlikely that the jury speculated at all about why Mack was not present and what his testimony would have been. Reasonable speculation would not have led to a conclusion that Mack's testimony would have been adverse to appellant, and it is therefore highly unlikely that the jurors so concluded. In any event, Mack's absence did not add critical weight to the Government's case and a *sua sponte* curative instruction was not necessary according to *Namet* v. *United States*, 373 U.S. 179 (1963). Finally, because of the questionable impact of such an instruction upon the jury, its rendering properly awaits a request by counsel.

ARGUMENT

The trial judge did not commit plain error when in the absence of a request he did not instruct the jury *sua sponte* to draw no inference unfavorable to appellant from the fact that Mack was not present at trial and did not testify.

Appellant argues that the trial judge committed plain error when he did not instruct the jury *sua sponte* to draw no inference unfavorable to appellant from the fact that Mack was not present at trial and did not testify. His contention is without merit.

Mack's joint participation with appellant in the crime for which appellant was on trial and his prompt arrest at the scene of that crime made it perfectly natural that his name would be mentioned as frequently as it was during the trial. The jury was not aware that Mack was present in the courthouse during trial and that after being advised he exercised his constitutional right not to testify. They did know he was a juvenile. Neither counsel ever commented on Mack's absence, mentioned that he did not testify or attempted to draw any inference from these facts. The instructions did not reflect the absence or the lack of testimony or comment thereon. In these circumstances it is unlikely that the jury speculated at all about why Mack was not present and what his testimony would have been. In any event, however, such speculation would not reasonably have led the jury to believe that Mack's testimony would have been unfavorable to appellant. Since he was at the Receiving Home, he was equally available as a witness to both sides. Any possible speculation that since the defense did not call Mack, his testimony would have been unfavorable to the defense version of the facts would surely have been met with and neutralized by a corresponding, opposite speculation that since the Government did not call him either, his testimony would have been unfavorable to the Government version. Therefore, the result of a reasonable speculation would have been that no inference could be drawn un-

favorable to either side.[1] Since the jury was highly unlikely on this record to make the inference that appellant now says should have been eradicated by a curative instruction, appellant cannot show prejudicial error. Error, if any, was harmless.

The cases relied on by appellant involve a situation markedly different from the one at bar. *Namet* v. *United States*, 373 U.S. 179 (1963). *Maloney* v. *United States*, 262 F.2d 535 (2d Cir. 1959).[2] In *Namet*, two of three

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[1] We submit therefore that appellant was not entitled below to the instruction he belatedly requests on appeal. The correct instruction, if requested, would have been that the jury should draw no inference unfavorable to either appellant or the Government from the fact that Mack was not present and did not testify. In *United States* v. *D'Angiolillo*, 340 F.2d 453, 457 (2d Cir.), *cert. denied*, 380 U.S. 955 (1965), where a police informer in a narcotics case did not testify for either side, an instruction that the informer was available to both parties and the jury could not draw an inference unfavorable to either from his not being called as a witness was held properly given.

[2] In *Maloney*, the Government's chief witness, Parker, was an accomplice to the criminal transaction who had pled guilty. According to his testimony, a scheme was devised to blackmail a Dr. Cohen after inducing him to perform an illegal abortion. The abortion was performed upon one Mascali. When Maloney and other defendants went to see Cohen after the abortion, Maloney showed FBI credentials and posed as an FBI agent. In part by this means $10,000 were extracted from Cohen. Maloney had gotten the credentials from one Silin and prior to using them had given them for safekeeping to his mistriss, one Parkhurst. In an effort to corroborate Parker's story, the prosecution called Parkhurst, Mascali and Silin to the stand in the presence of the jury. Parkhurst was asked whether she had put anything in her safe deposit box at Maloney's request; Mascali was asked about the abortion arrangements; and Silin was asked whether he had procured some credentials for Maloney. Each witness refused to answer on self-incrimination grounds. Judge Learned Hand observed that it could hardly be doubted that the answers of the witnesses, if given, would have corroborated Parker's story, that the prosecution knew or anticipated that Parkhurst and Mascali would refuse to testify and that in closing argument the prosecutor's comment on Silin's refusal to answer implicitly argued that his answer would have been favorable to the Government. Judge Hand held that in these circumstances the failure of the trial judge *sua sponte* to instruct that the jury was not to take a refusal to answer as evidence of

persons charged with violating the federal wagering tax laws had pled guilty. The two were called by the Government in the trial of the third, Namet, asked in substance whether they had engaged in criminal activity with him and refused to answer on self-incrimination grounds. The Government did not refer to the refusals in its closing, and the jury was not aware that the three had been charged together. A correct cautionary instruction on the refusals to answer was not given and none was requested. Reversible error could have occurred, the Court said, (1) if there had been prosecutorial misconduct, as where the Government attempts to build its case out of inferences naturally flowing from the use of the privilege, or (2) if "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination" and therefore prejudiced defendant. *Id.* at 186-87. No reversible error was found under either criterion. And since neither misconduct nor inferences of material importance were present, the Court held that it was not reversible error for the trial court not to have rendered *sua sponte* a correct cautionary instruction—"We see no reason to require such extravagant protection against errors which were not obviously prejudicial and which the petitioner himself appeared to disregard." *Id.* at 190.[3]

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what the answer would have been was plain error within Rule 52(b), Fed. R. Crim. P. The Court recognized, however, that

> it is doubtful whether such admonitions are not as likely to prejudice the interest of the accused as to help them, imposing, as they do, upon the jury a task beyond their powers: i.e. a bit of "mental gymnastics," as Wigmore, § 2272 calls it, which it is for practical purposes absurd to expect of them. 262 F.2d at 538.

Judge Hincks, dissenting, thought that the required instruction might have stimulated the jury to conjectures which otherwise would not have occurred to them and that since the effect of the instruction was doubtful, the court should have made a request for it a prerequisite to reversible error.

[3] This Court followed *Namet* in *Fletcher* v. *United States*, 118 U.S. App. D.C. 137, 332 F.2d 724 (1964). There the Government

In *Maloney*, unlike in the case at bar, the Government acted affirmatively in attempting to build its case out of inferences from actual refusals to testify in the presence of the jury, and the inferences naturally flowing from those refusals were in fact unfavorable to defendant. And we submit that *Namet*, if anything, supports our position that there was no plain error here in not giving a cautionary instruction because here there was no prosecutorial misconduct and any speculative inferences from Mack's absence from trial could not have added critical weight to the Government's case. In *Namet*, the Court found no critical weight despite the fact that a natural inference unfavorable to appellant did flow from the refusals to answer. Here there was no such natural inference from the mere fact that Mack did not appear and testify.[4]

Appellant candidly admits, as he must, that because he did not request any curative instruction below, he must now demonstrate "plain error" within the meaning of Rule 52(b), Fed. R. Crim. P. We submit that error here, if any, did not rise to that level. See *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, *cert. denied*,

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called defendant's juvenile accomplice and asked him a lengthy series of questions, all of which he refused to answer on self-incrimination grounds. The Court reversed because the curative instruction given did not forcefully preclude the jury from drawing an inference adverse to defendant from the juvenile's refusals to answer.

[4] See *Edwards* v. *United States*, 361 F.2d 732 (8th Cir. 1966), which would have been controlling precedent if Mack had been called to the stand before the jury by the defense and had then refused to answer. Edwards told an exculpatory story placing the whole blame on Turner, who was charged with the same offense and was awaiting trial. Called by the defense Turner refused to answer questions. The trial judge did not commit plain error, the court held, when he did not *sua sponte* instruct the jury they were to disregard Turner's testimony and draw no inferences therefrom unfavorable to Edwards. The court observed that since the defense rather than the Government hoped to benefit from the inference from the refusal to answer, the instruction requested would have done Edwards more harm than good.

375 U.S. 898 (1963);[5] *McKnight* v. *United States*, 114 U.S. App. D.C. 40, 309 F.2d 660 (1962);[6] *Trent* v. *United States*, 109 U.S. App. D.C. 152, 284 F.2d 286 (1960), *cert. denied*, 365 U.S. 889 (1961);[7] Rule 30, Fed. R. Crim. P. In this connection we note that appellant has not found a case, nor have we, which goes as far as to say that the failure to render a cautionary instruction on these facts when one is requested is reversible error. And the failure to make the request below should be deemed eloquent evidence that even appellant there thought, as we have argued, that the absence of an instruction was harmless to his cause. See *Maloney* v. *United States*, *supra*, 540 (dissenting opinion).

Courts have ruled analogously that it is not reversible error where the defense makes no request not to instruct when the defendant does not testify that the accused in a criminal trial has the right not to testify and the jury should draw no inference unfavorable to him because he did not testify. See *Ingram* v. *United States*, 110 A.2d 693 (D.C. Ct. App. 1955); *United States* v. *Gulley*, 374 F.2d 55 (6th Cir. 1967); *Cohen* v. *United States*, 366 F. 2d 363 (9th Cir. 1966) (dictum), *cert. denied*, 385 U.S. 1035 (1967); *Pereira* v. *United States*, 202 F.2d 830 (5th Cir. 1953), *aff'd*, 347 U.S. 1 (1954). See also *United States* v. *Stallings*, 273 F.2d 740 (2d Cir. 1960). As a matter of trial strategy such an instruction is often thought to do more harm than good, and because of its doubtful impact rendering properly awaits a request by counsel. The same reasoning applies here where trial

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[5] In *Williams*, while a denial of a lesser included offense instruction would have been reversible error if requested, it was not plain error to give one *sua sponte*.

[6] In *McKnight*, an instruction that the unexplained possession of recently stolen property was sufficient to support a guilty verdict was deemed reversible error. However, with no objection registered below, the Court held there was no plain error.

[7] In *Trent*, the Court assumed that a missing witness instruction should have been given at defense request. However, the failure to give it *sua sponte* was not plain error.

counsel may have feared that a judicial direction not to draw an inference adverse to appellant might have stimulated the jurors to speculate that such an inference existed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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